

**United States Department of Labor
Employees' Compensation Appeals Board**

H.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
St. Louis, MO, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 20-1658
Issued: April 15, 2021**

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

PATRICIA H. FITZGERALD, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 24, 2020 appellant, through counsel, filed a timely appeal from an August 28, 2020 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision dated January 26, 2018 to the filing of this appeal, pursuant to the Federal Employees' Compensation Act (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the case.

ISSUE

The issue is whether OWCP properly denied appellant's August 21, 2020 request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On August 14, 2017 appellant, then a 59-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that he developed right carpal tunnel syndrome and right cubital tunnel syndrome as a result of factors of his federal employment, including constant lifting and carrying of packages weighing up to 10 pounds, pushing and pulling tubs of mail, and sorting mail for 10 to 12 hours per day, six days per week. He noted that he first became aware of his claimed condition and its relationship to factors of his federal employment on January 5, 2015. On the reverse side of the claim form the employing establishment indicated that appellant was last exposed to the condition alleged to have caused his condition on August 14, 2017.

By decision dated January 26, 2018, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that the events surrounding the claimed condition occurred as alleged. Therefore, it concluded that the requirements had not been met to establish an injury as defined by FECA.

On February 16, 2018 appellant requested reconsideration of the January 26, 2018 decision and submitted additional evidence in support of his claim.

By decision dated May 16, 2018, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant a review of the merits of its January 26, 2018 decision.

On August 28, 2018 appellant timely appealed to the Board from the May 16, 2018 OWCP nonmerit decision.

By decision dated March 14, 2019, the Board affirmed OWCP's March 16, 2018 nonmerit decision. It found that appellant had not established that OWCP erroneously applied or interpreted a specific point of law. The Board further found that he had not advanced a new and relevant legal argument or submitted relevant evidence not previously considered by OWCP. Consequently, the Board found that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

OWCP subsequently received medical evidence in support of appellant's claim, which it had not previously considered, including a July 3, 2018 narrative report from Dr. Bruce Schlafly, an orthopedic hand surgeon, wherein he diagnosed severe right carpal tunnel syndrome and opined that appellant's repetitive work duties as a mail carrier caused his diagnosed condition.

On August 21, 2020 appellant, through counsel, requested reconsideration.

² Docket No. 18-1660 (issued March 14, 2019).

By decision dated August 28, 2020, OWCP denied appellant's request for reconsideration, finding that it was untimely filed and failed to demonstrate clear evidence of error.³

LEGAL PRECEDENT

Pursuant to section 8128(a) of FECA, OWCP has the discretion to reopen a case for further merit review.⁴ This discretionary authority, however, is subject to certain restrictions. For instance, a request for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁵ Timeliness is determined by the document receipt date, *i.e.*, the "received date" in OWCP's Integrated Federal Employees' Compensation System (iFECS).⁶ Imposition of this one-year filing limitation does not constitute an abuse of discretion.⁷

When a request for reconsideration is untimely, OWCP undertakes a limited review to determine whether the request demonstrates clear evidence that OWCP's most recent merit decision was in error.⁸ OWCP's procedures provide that it will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's request for reconsideration demonstrates "clear evidence of error" on the part of OWCP.⁹ In this regard, OWCP will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.¹⁰

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.¹¹ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error. Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate

³ OWCP actually referred to the Board's March 14, 2019 decision. However, OWCP has no jurisdiction to review a Board decision. The decisions and orders of the Board are final as to the subject matter appealed and such decisions and orders are not subject to review, except by the Board. *See* 20 C.F.R. § 501.6(d). Appellant had 30 days from the date of the Board's March 14, 2019 decision to file a petition for reconsideration with this Board of its decision. Therefore, the proper subject of modification is the January 26, 2018 OWCP merit decision. *Id.* at § 501.7. *See also J.D.*, Docket No. 20-0838 (issued February 24, 2021); *C.M.*, Docket No. 19-1211 (issued August 5, 2020); *B.B.*, Docket No. 14-0464 (issued June 4, 2014).

⁴ 5 U.S.C. § 8128(a); *L.W.*, Docket No. 18-1475 (issued February 7, 2019); *Y.S.*, Docket No. 08-0440 (issued March 16, 2009).

⁵ 20 C.F.R. § 10.607(a).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (February 2016).

⁷ *G.G.*, Docket No. 18-1072 (issued January 7, 2019); *E.R.*, Docket No. 09-0599 (issued June 3, 2009); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

⁸ *See* 20 C.F.R. § 10.607(b); *M.H.*, Docket No. 18-0623 (issued October 4, 2018); *Charles J. Prudencio*, 41 ECAB 499 (1990).

⁹ *L.C.*, Docket No. 18-1407 (issued February 14, 2019); *M.L.*, Docket No. 09-0956 (issued April 15, 2010). *See also* 20 C.F.R. § 10.607(b); *supra* note 6 at Chapter 2.1602.5 (February 2016).

¹⁰ *J.M.*, Docket No. 19-1842 (issued April 23, 2020); *Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *S.C.*, Docket No. 18-0126 (issued May 14, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

clear evidence of error. It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP. To demonstrate clear evidence of error, the evidence submitted must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹²

OWCP's procedures note that the term clear evidence of error is intended to represent a difficult standard. The claimant must present evidence which on its face demonstrates that OWCP made an error (for example, proof that a schedule award was miscalculated). Evidence such as a detailed, well-rationalized medical report which, if submitted before the denial was issued, would have created a conflict in medical opinion requiring further development, is not clear evidence of error.¹³ The Board makes an independent determination of whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁴

ANALYSIS

The Board finds that OWCP properly determined that appellant's August 21, 2020 request for reconsideration was untimely filed.

The last merit decision of record was issued on January 26, 2018. As appellant's request for reconsideration was not received by OWCP until August 21, 2020, more than one year after the January 26, 2018 merit decision, pursuant to 20 C.F.R. §10.607(a), the Board finds the request for reconsideration was untimely filed. Consequently, he must demonstrate clear evidence of error by OWCP in denying the claim.¹⁵

The Board further finds that OWCP did not make sufficient findings regarding the evidence submitted in support of the reconsideration request.¹⁶ OWCP denied appellant's request for reconsideration without complying with the review requirements of FECA and its implementing regulations.¹⁷ Section 8124(a) of FECA provides that OWCP shall determine and make a finding of fact and make an award for or against payment of compensation.¹⁸ Its regulations at section

¹² *C.M.*, Docket No. 19-1211 (issued August 5, 2020).

¹³ *J.S.*, Docket No. 16-1240 (issued December 1, 2016); *supra* note 6 at Chapter 2.1602.5(a) (February 2016).

¹⁴ *D.S.*, Docket No. 17-0407 (issued May 24, 2017).

¹⁵ 20 C.F.R. § 10.607(b); *see R.T.*, Docket No. 19-0604 (issued September 13, 2019); *see Debra McDavid*, 57 ECAB 149 (2005).

¹⁶ *See Order Remanding Case, J.K.*, Docket No. 20-0556 (issued August 13, 2020); *Order Remanding Case, C.D.*, Docket No. 20-0450 (issued August 13, 2020); *Order Remanding Case, T.B.*, Docket No. 20-0426 (issued July 27, 2020).

¹⁷ *See C.G.*, Docket No. 20-0051 (issued June 29, 2020); *T.P.*, Docket No. 19-1533 (issued April 30, 2020); *see also* 20 C.F.R. § 10.607(b).

¹⁸ 5 U.S.C. § 8124(a).

10.126 provide that the decision of the Director of OWCP shall contain findings of fact and a statement of reasons.¹⁹ As well, OWCP's procedures provide that the reasoning behind OWCP's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it.²⁰

In denying appellant's August 21, 2020 reconsideration request, OWCP noted: "Although you submitted a medical report from Dr. Schlafly dated 07/03/2018 and it was received on 02/10/2020, it was received more than one year after the last merit review." It further included an incomplete statement that, "The basis for this decision is," and then failed to offer any further explanation or discussion regarding the additional evidence.²¹

The Board will, therefore, set aside OWCP's August 28, 2020 decision and remand the case for an appropriate decision on appellant's untimely reconsideration request, which describes the evidence submitted on reconsideration and provides detailed reasons for accepting or rejecting the reconsideration request.²²

CONCLUSION

The Board finds that OWCP properly determined that appellant's August 21, 2020 request for reconsideration was untimely filed. However, the Board further finds that the case is not in posture for decision with regard to whether the untimely reconsideration request demonstrates clear evidence of error.

¹⁹ 20 C.F.R. § 10.126.

²⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.5 (February 2013).

²¹ See *J.K.*, *supra* note 16.

²² 5 U.S.C. § 8124(a).

ORDER

IT IS HEREBY ORDERED THAT the August 28, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part, set aside in part, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: April 15, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board